APPELLANT PRO SE:

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ATTORNEYS FOR APPELLEE:

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# IN THE
# COURT OF APPEALS OF INDIANA

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| MARVIN GRAVES, | ) | |
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| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0607-PC-605 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-9707-PC-100842

**May 9, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Marvin Graves appeals the denial of his petition for post-conviction relief. We affirm.

## Issues

Graves raises four issues, which we consolidate and restate as:

I. whether he received ineffective assistance of trial counsel; and

II. whether he received ineffective assistance of appellate counsel.

## Facts

On July 9, 1997, Graves, Wilson Bales, and another man accosted and robbed Joseph Jones. Graves and the other two assailants stole a pistol, marijuana, a silver collection, and a stereo speaker from Jones. During the attack, Graves hit Jones, kicked Jones, and shot Jones in the legs. The State charged Graves with Class A felony robbery, Class B felony criminal confinement, Class D felony auto theft, and Class A misdemeanor carrying a handgun without a license. A jury found Graves guilty as charged. In 1999, we reversed Graves's convictions based on an instructional error. See Graves v. State, 714 N.E.2d 724 (Ind. Ct. App. 1999).

In 2001, Graves was recharged. After the second trial, a jury found Graves guilty of Class A felony robbery and acquitted him of the remaining charges. Graves filed a direct appeal arguing that the verdicts were inconsistent. We affirmed his conviction. See Graves v. State, No. 49A05-0105-CR-185 (Ind. Ct. App. Feb. 4, 2002).

On October 21, 2002, Graves filed a petition for post-conviction relief. After a hearing, the post-conviction court denied his petition. Graves now appeals pro se.

**Analysis**

Our review of the post-conviction court's decision is narrow. Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). We give great deference to the post-conviction court and reverse that decision only when the evidence as a whole leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Id.

***I. Ineffective Assistance of Trial Counsel***

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead, 845 N.E.2d at 1031. A claimant must show that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms and that the deficient performance resulted in prejudice. Id. (citing Strickland, 466 U.S. at 687-88, 104 S. Ct. 2052, 2065). "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability arises when there is a 'probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

The two parts of the Strickland test are separate inquires, and a claim may be disposed of on either prong. Id. The Strickland court stated that if it is easier to dispose of a claim based on the lack of prejudice, that course should be followed. Id. (quoting

Strickland, 466 U.S. at 697, 104 S. Ct. at 2069). However, our supreme court recently observed:

> It is thus fairly common practice in Indiana to address only the prejudice prong, as it frequently represents a short cut. Doing that may save time, but it can also degrade the post-conviction process into a super appeal, just the thing we say post-conviction is not. Reviewing courts should remain mindful that there are occasions when it is appropriate to resolve a post-conviction case by a straightforward assessment of whether the lawyer performed within the wide range of competent effort that Strickland contemplates.

Id.

Graves first argues that trial counsel failed to reasonably investigate his claim that William Pargo would have testified that Graves was elsewhere when the robbery occurred. "When deciding a claim of ineffective assistance of counsel for failure to investigate, we apply a great deal of deference to counsel's judgments." Boesch v. State, 778 N.E.2d 1276, 1283 (Ind. 2002). Here, there is no support for Graves's claim that trial counsel failed to investigate the alleged alibi. At the post-conviction relief hearing, trial counsel testified that he attempted to locate Pargo. Trial counsel also stated that he independently reviewed the State's discovery materials, interviewed Jones and Bales, and periodically met with Graves. The fact that trial counsel was unable to locate Pargo does not in and of itself amount to ineffective assistance of counsel. This is especially true where Graves offers nothing other than bald assertions as to what additional evidence Pargo would have provided had trial counsel been able to locate him. Graves has not established that trial counsel's investigation of the case fell below an objective standard of reasonableness.

Graves next argues that trial counsel was ineffective for failing to object to or offer verdict forms regarding the lesser-included offense of Class C felony robbery.[1] Graves concedes that the jury was instructed on the lesser-included offense but offered no evidence to the post-conviction court supporting his assertion that the jury did not receive a verdict form relating to that offense. Thus, he did not establish by a preponderance of the evidence that the jury received improper verdict forms, giving rise to a basis for trial counsel to object. Accordingly, Graves has not demonstrated that trial counsel's performance fell below an objective standard of reasonableness.

Moreover, with regard to these two claims of ineffective assistance of counsel, Graves has not established prejudice. At the second trial, Jones testified that Graves hit and kicked him, that Graves shot him in the left leg, and that before Graves left, Graves said "[d]ie honky" and shot him twice more in the right leg. Tr. p. 22. Jones also testified that Graves and the other men took silver, stereo speakers, and a gun from Jones's house. Bales, who had previously pled guilty regarding his role in the offense, testified at the second trial that during the robbery Graves shot Jones in the leg and that as Bales and the other man left the house he heard another shot being fired. Thus, Graves's participation was not an issue at trial, and the serious bodily injury to Jones, which enhanced the robbery to a Class A felony, was obvious. In light of this evidence against Graves, he has not shown that he was prejudiced by trial counsel's alleged errors.

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[1] In his reply brief, Graves argues that the jury should have received a verdict form for the lesser-included offense of Class B felony robbery. Graves contends that his "acquittal of the handgun charge concludes that Graves was not armed and could not have 'shot the victim 3 times.'" Reply Br. p. 2. To the extent that this issue was not addressed on direct appeal, because he raises this issue for the first time in his reply brief, it is waived. See French v. State, 778 N.E.2d 816, 826 (Ind. 2002).

Graves also argues that trial counsel failed to offer mitigating circumstances during the sentencing hearing and failed to object to the imposition of an enhanced sentence based on aggravating circumstances not found by a jury. Regarding the alleged mitigating circumstances, however, Graves does not identify specific circumstances that trial counsel should have offered. As such, he has not shown by a preponderance of the evidence that trial counsel was ineffective for failing to offer the alleged mitigating circumstances.

As to the enhanced sentence, Graves essentially argues that based on Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), in which the United States Supreme Court stated, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,]" trial counsel should have anticipated the United State's Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 2537 (2004) defining statutory maximum as "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." However, our supreme court has observed, "Because Blakely radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure." Smylie v. State, 823 N.E.2d 679, 687 (Ind. 2005), cert. denied 126 S. Ct. 545.

In fact, the Smylie court specifically stated that an attorney is not required to anticipate changes in the law in order to be considered effective and that a trial lawyer or

an appellate lawyer would not be ineffective for proceeding without adding a Blakely claim before Blakely was decided. Id. at 690. Blakely was decided in 2004, well after Graves's April 27, 2001 sentencing hearing. Graves has not established that trial counsel's performance fell below an objective standard of reasonableness for failing to anticipate the outcome in Blakely and construct arguments accordingly.

Graves has not shown that the evidence leads unerringly and unmistakably to the conclusion opposite that reached by the post-conviction court. As such, the post-conviction court properly denied his claim of ineffective assistance of trial counsel.

### *II. Ineffective Assistance of Appellate Counsel*

Graves also appears to argue that appellate counsel was ineffective for failing to raise the alleged Blakely error on direct appeal.[2] "The standard of review for a claim of ineffective assistance of appellate counsel is the same as for trial counsel in that the defendant must show appellate counsel was deficient in her performance and that the deficiency resulted in prejudice." Reed v. State, 856 N.E.2d 1189, 1195 (Ind. 2006).

As we discussed, our supreme court has already concluded that a defendant does not receive ineffective assistance of counsel because trial or appellate counsel did not argue Blakely before it was decided. See Smylie, 823 N.E.2d at 690. Because our decision in Graves's direct appeal was handed down on February 4, 2002, well before

[2] To the extent Graves argues that appellate counsel was required to assert a claim of ineffective assistance of trial counsel on direct appeal, we disagree. See McCorker v. State, 797 N.E.2d 257, 262 n.5 (Ind. 2003) (noting that a claim of ineffective assistance of counsel is generally best reserved for a post-conviction proceeding).

Blakely was decided in 2004, we cannot conclude that appellate counsel should have anticipated the outcome in Blakely and argued accordingly.

Graves has not established that appellate counsel's performance fell below an objective standard of reasonableness. The post-conviction court properly denied Graves's petition.

**Conclusion**

Graves has not shown that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. Thus, the post-conviction court properly denied his petition. We affirm.

Affirmed.

NAJAM, J., and RILEY, J., concur.